No. 80-412

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In the Supreme Court of the United States

OCTOBER TERM, 1980

GOOD HOPE REFINERIES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the Board properly concluded that petitioner violated Section 8(a)(5) and (1) of the National Labor Relations Act by unilaterally refusing to allow its employees union representation during absence counseling interviews, in violation of its contract with the Union and established past practice.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1sa-7sa) is reported at 620 F. 2d 57. The decision and order of the Board (Pet. App. 8sa-32sa) are reported at 245 N.L.R.B. No. 39.

JURISDICTION

The judgment of the court of appeals (Pet. App. 33sa) was entered on June 23, 1980. The petition for a writ of certiorari was filed on September 15, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set out in the petition (Pet. 2-5).

STATEMENT

1. On August 29, 1978,[1] the Company sent two documents signed by its manager of personnel, Jerry Deutsch, concerning changes in its policy with respect to employee absences to its employees. The first document advised the employees that, effective September 6, they were to report to the Company's personnel office upon their return from unexcused full or partial absences. The second document stated that all of the Company's employees were required to maintain satisfactory attendance, listed several types of absences specifically excused under the contract between the Company and the Union,[2] and indicated that employees who were absent or

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[1]All dates are in 1978, unless otherwise indicated.

[2]Oil, Chemical and Atomic Workers International Union, Local 4-447.

tardy would be subject to disciplinary action including warnings, suspension and termination (Pet. App. 17sa-18sa).

Prior to the implementation of this system, counseling of the Company's employees concerning absences was performed by the immediate supervisor of the respective employee, generally on the job. Whenever an employee was counseled in an office, he was permitted to have union representation upon request (Pet. App. 18sa). The policy of providing union representation to employees during absence counseling sessions was in accordance with the following provision of the collective bargaining agreement then in effect between the Company and the Union (Pet. App. 23sa):

> An employee may request union representation at any stage of the disciplinary procedure directed toward the said employee, including the investigatory stage, and such representation shall not be denied by the Company. The Union agrees that it will furnish such representation to the employee.

Simultaneously with mailing the two documents concerning its new absence policy to its employees on August 29, the Company advised the Union that it was doing so. In response, by a letter dated September 7, the Union protested that the policies announced in the August 29 documents constituted unilateral changes (Pet. App. 18sa).

On September 8, employee Gary Sullivan returned to work following a three-day absence. Sullivan had received permission from his supervisor to miss work on September 5, the first of the three days, in order to take his daughter to the hospital. Sullivan had not received permission to miss work on September 6 and 7. Those absences were necessitated by the death and funeral of Sullivan's aunt (Pet. App. 18sa).

Upon returning to work on September 8, Sullivan was instructed by his supervisor to report to the office of Personnel Manager Deutsch. Sullivan requested Union Steward Gail Simmons to accompany him to Deutsch's office and Simmons received permission from his supervisor to go with Sullivan, but Deutsch was not in his office when they arrived and after waiting for about an hour they returned to their work area (Pet. App. 18sa). Sullivan then was advised by his supervisor to see Deutsch later that morning. The supervisor also told Sullivan that Deutsch had said that he would not need union representation. After discussing the matter with Sullivan, Union Steward Simmons called Deutsch and advised him that Sullivan had requested union representation and that he was entitled to representation under the contract. Deutsch told Simmons that Sullivan did not need union representation, but that he also wanted to see Simmons and that " 'you do need union representation, but I'll provide it for you' " (Pet. App. 19sa).

When Sullivan reported to Deutsch's office later that morning, Deutsch told him, " 'well, you're not here for a reprimand, I just want to know why you were off those 3 days.' " At that point, Sullivan requested union representation. Deutsch replied, " 'if you get union representation over here, it could lead to a letter or discipline.' " Sullivan then refused to answer Deutsch's question concerning his three-day absence. Subsequently, Gail Simmons and another Union steward were called to Deutsch's office, and Sullivan explained his absences to Deutsch in their presence. Deutsch stated that since Sullivan's supervisor had excused the first day of Sullivan's three-day absence Deutsch could do nothing about that, but that he would not excuse the two days Sullivan had taken off for his aunt's funeral. Deutsch also

told Sullivan that he had not needed union representation that morning and that Sullivan's refusal to answer questions without union representation constituted insubordination and would result in a letter of reprimand being placed in his file. On September 11, a written warning describing the above incident was placed in Sullivan's file (Pet. App. 19sa-20sa).

2. An administrative law judge found that the Company had violated Section 8(a)(1) of the National Labor Relations Act by requiring Sullivan to participate without union representation in an absence counseling interview that he reasonably anticipated could have resulted in his being disciplined, by disciplining Sullivan for refusing to answer questions after his request for union representation was denied, and by requiring Union Steward Simmons to account for his efforts to represent Sullivan at the interview and threatening Simmons with discipline for those efforts. The administrative law judge also found that petitioner's change in its absence counseling system constituted a unilateral change from the contractual provision allowing union representation at any stage of the disciplinary procedure, and thus violated Section 8(a)(5) of the Act since it involved a mandatory subject of bargaining (Pet. App. 26sa-28sa).

The Board affirmed the administrative law judge's findings of Section 8(a)(1) violations, and agreed that the Company's refusal to allow its employees union representation under its new absence counseling system violated Section 8(a)(5) and (1) of the Act as a unilateral change in its collective bargaining agreement with the Union.[3] The Board order requires the Company, *inter*

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[3] The Board found (Pet. App. 9sa n.3), however, that the change in the Company's absence counseling system requiring that employees report to the personnel office rather than to their immediate

alia, to revoke and remove from its records all disciplinary warnings issued as a result of its change in policy concerning union representation at absence counseling interviews to employee Sullivan or any other employee represented by the Union and to bargain with the Union, upon its request, concerning any contemplated changes in employees' terms and conditions of employment, including changes in policy regarding absence counseling sessions (Pet. App. 8sa-12sa).

3. The court of appeals upheld the Board's decision and enforced its order (Pet. App. 1sa-7sa). The court agreed with the Board that the Company's policy concerning union representation at absence counseling sessions was a mandatory subject of bargaining, and it concluded that substantial evidence supported the Board's finding that the Company's denial of an employee's request for representation at an absence counseling interview was a departure from past practice, which constituted an unlawful unilateral change (Pet. App. 5sa-7sa).

ARGUMENT

The Company does not dispute the Board's finding that its denial of the right to union representation in absence counseling sessions constituted a unilateral modification of its collective bargaining agreement with the Union, but rather contends that this unilateral change was not violative of Section 8(a)(5) and (1) of the Act because it did not involve a mandatory subject of bargaining. There is no merit to this claim.

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supervisor was a valid exercise of a management right. It also declined (Pet. App. 9sa n.2) to decide whether the warning issued to employee Sullivan violated Section 8(a)(3), as well as Section 8(a)(1), of the Act.

It is well settled that an employer acts in derogation of its bargaining obligation under Section 8(d) of the National Labor Relations Act, and thereby violates Section 8(a)(5) and (1) of the Act, when it alters a contractual provision that is a mandatory subject of bargaining during the effective period of the contract without the consent of the Union.[4] *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 159, 185-188 (1971); see *NLRB* v. *C & C Plywood Corp.*, 385 U.S. 421 (1967); cf. *NLRB* v. *Katz*, 369 U.S. 736, 743, 747 (1962). In general, a matter is a mandatory subject of bargaining within the meaning of Section 8(d) if it "settle[s] an aspect of the relationship between the employer and employees." *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co., supra,* 404 U.S. at 178. Accord, *Local 24, International Brotherhood of Teamsters* v. *Oliver*, 358 U.S. 283, 294-295 (1959); *NLRB* v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 350 (1958). Moreover, the "classification of bargaining subjects as 'terms or conditions of employment' is a matter concerning which the Board has special expertise." *Local 189, Amalgamated Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676, 685-686 (1965). See also *Ford Motor Co.* v. *NLRB,* 441 U.S. 488, 495, 497 (1979) ("[c]onstruing and applying the duty to bargain and the language of § 8(d), 'other terms and conditions of employment,' are tasks lying at the heart of the Board's function").

In the instant case, the Board concluded that the ability of employees to obtain union representation during absence counseling interviews was a mandatory subject of bargaining. The court of appeals upheld the Board's

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[4]Section 8(d) of the Act defines the subjects about which an employer must bargain as "wages, hours, and other terms and conditions of employment * * *."

determination, concluding (Pet. App. 7sa) that, in the circumstances presented, the opportunity to obtain representation in absence counseling sessions "had a direct impact on the employment relationship, since the employee's refusal to submit to the counseling session in the absence of union representation became a permanent part of an employee's personnel file which could affect his future job security." The Board's determination is entirely consistent with and supported by the relevant case-law. In *Alfred M. Lewis, Inc.* v. *NLRB*, 587 F. 2d 403, 412 (9th Cir. 1978), the court held that the right of employees to have union representation at counseling sessions that may result in disciplinary action is a mandatory bargaining subject within the meaning of Section 8(d) of the Act since it "directly concern[s] an aspect of the employer-employee relationship * * * and such representation could potentially have a substantial impact on job security and tenure."[5] Cf. *NLRB* v. *Amoco Chemicals Corp.*, 529 F. 2d 427, 431 (5th Cir. 1976) (unilateral change from practice of issuing informal warnings to disciplinary system involving written reprimands violated Section 8(a)(5)); *Murphy Diesel Co.* v. *NLRB*, 454 F. 2d 303, 307 (7th Cir. 1971) (unilateral institution of formal disciplinary procedure regarding absences and tardiness and requirement that employees submit formal written explanations of absences and tardiness rather than oral excuses violated Section 8(a)(5) and (1)); *NLRB* v. *Miller Brewing Co.*, 408 F. 2d 12 (9th Cir. 1969) (unilateral promulgation of general plant regulations and accompanying

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[5] The *Lewis* court distinguished between counseling that "was an integral part of the disciplinary system and was deemed by management to be a preliminary stage in the imposition of discipline" and meetings at which the employee simply was advised of disciplinary action that was to be taken against him, without any interrogation of him, and held that an employee was entitled to union representation only at the former type of interview (587 F. 2d at 410-411).

enforcement machinery violated Section 8(a)(5) and (1)); *NLRB* v. *Gulf Power Co.*, 384 F. 2d 822, 825 (5th Cir. 1967) (unilateral institution of safety rules and practices violated Section 8(a)(5) and (1)).

The Company contends (Pet. 8-13) that the employees' Section 7 right to union representation at an investigatory interview, recognized in *NLRB* v. *Weingarten, Inc.*, 420 U.S. 251 (1975), is so "uniquely individual" that it cannot be a mandatory bargaining subject. If it were, the Company argues (Pet. 11), not only could the employees' union representative insist that the right be incorporated in the collective bargaining agreement, but the employer also could insist that there be no right to representation and, once an impasse were reached, "the employer would then be within its rights to implement [its position], thus stripping the individuals of any right to representation."

The Company's contention is fallacious. A union, in bargaining for contractual recognition of the employees' right to union representation, is seeking to *augment* the protection afforded by the Act. The mere fact that the union fails to secure the additional *contractual* protection of the right to union representation does not mean that it has waived the *statutory* right to union representation that this Court recognized in *NLRB* v. *Weingarten, Inc., supra*. Thus, even if an impasse on the issue of the inclusion in the contract of a right to union representation were reached, the employer would not be free to deprive the employees of their statutory right to union representation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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